

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Billy Cepero,
Plaintiff
v.
Douglas Gillespie, et al.,
Defendants

Case No.: 2:11-cv-01421-JAD-GWF

**Order Granting Motion to Dismiss
[Doc. 36] and Granting in Part and
Denying in Part Motion for Copy of the
Docket Sheet or for Status Check
[Doc. 59]**

16 This case arises out of Plaintiff Billy Cepero's arrest on August 26, 2009, during which Las
17 Vegas Metropolitan Police Department officers allegedly violated Cepero's Fourth Amendment
18 rights by acting with excessive force. Doc. 1 at 7; Doc. 29 at 1. He further alleges state torts
19 committed by LVMPD and its officers: assault and battery, emotional and physical injuries, and
20 negligence. Doc. 1 at 7; Doc. 29 at 1; Doc. 19. Before the Court is the Motion to Dismiss filed June
21 14, 2012, by LVMPD and by the 21 officers named in this suit. Doc. 36 at 1. Cepero's response
22 was due July 1, 2012; he responded more than five weeks late on August 6, 2012. Doc. 55.
23 Defendants timely replied on August 13, 2012. Doc. 56. The Court also considers Cepero's Motion
24 for Copy of the Docket Sheet or, in the Alternative, for Status Check of Case Activity filed
25 November 19, 2012. Doc. 59.¹

¹ This case was transferred to Judge Jennifer A. Dorsey on August 9, 2013. Doc. 62.

1 After a full review of the record and applicable law, the Court grants the Motion to Dismiss.
 2 Doc. 36. It also grants in part and denies in part the Motion for Status Check, as discussed below.
 3 Doc. 59. While recognizing that Cepero's response to the Motion to Dismiss was not timely filed,
 4 the Court finds that the arguments raised in his response do not change the outcome of his suit.²

5 **I.**

6 **Discussion**

7 **A. All of Cepero's Claims Are Time-barred.**

8 Defendants argue that all of Cepero's state and federal claims were filed outside the two-year
 9 statute of limitations, rendering them time-barred. Doc. 36 at 1–2. When a party sues for federal
 10 torts under 42 U.S.C. § 1983, the statute of limitations is drawn from the forum state's personal
 11 injury statute. *Perez v. Seavers*, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam); *see also Orr v.*
 12 *Bank of Am.*, 285 F.3d 764, 781 n.29 (9th Cir. 2002) (citing *Perez v. Seavers*, 869 F.2d 425, 426 (9th
 13 Cir. 1989)). “Under the applicable Nevada statute of limitations, [Cepero] had two years within
 14 which to commence his section 1983 claim.” *Perez*, 869 F.2d at 426 (citing NEV. REV. STAT. §
 15 11.190(4)(e)). The “action is deemed to be commenced when the complaint was filed.” *Id.*
 16 Likewise, Cepero must have “file[d] a complaint within the standard two year limitation period of
 17 NRS 11.190(4)(e)” to bring his state claims. *Jiminez v. Nevada*, 644 P.2d 1023, 1024 (Nev. 1982).

18 Cepero alleges, and Defendants agree, that he was arrested on August 26, 2009. Doc. 1 at
 19 7; Doc. 29 at 7; Doc. 36 at 1–2. The statute of limitations provided him until August 26, 2011, to
 20 file his claims. He missed that deadline by one week.³ Under binding law, all of Cepero's claims
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23 ² The Court further bears in mind that “a *pro se* complaint, however inartfully pleaded,” is
 24 liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S.
 25 97, 106 (1976)) (internal quotation marks omitted). The Court also finds these motions appropriate for
 26 disposition without oral argument. L.R. 78-2. Plaintiff was timely provided with the notice required
 27 under *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc), *Wyatt v. Terhune*, 315 F.3d 1108 (9th
 28 Cir. 2003), and *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988). Doc. 37.

2 ³ The earliest date on which Cepero's complaint could have been filed was September 2, 2011,
 2 when he submitted an application to proceed *in forma pauperis* and attached a complaint. Doc. 1.

1 arising out of his August 26, 2009, arrest are thus time-barred. *See Douglas v. Noelle*, 567 F.3d
 2 1103, 1107 (9th Cir. 2009); *see also* Nev. Rev. Stat. § 41.036(2).

3 **B. Cepero's State Claims Are Untimely under Nevada's Claim-notice Statute.**

4 In addition to the personal-injury statute of limitations, Nevada Revised Statute § 41.036
 5 requires that “[e]ach person who has a claim against any political subdivision of the State arising out
 6 of a tort must file the claim within 2 years after the time the cause of action accrues with the
 7 governing body of that political subdivision.” Nev. Rev. Stat. § 41.036(2). While this “is not a
 8 condition precedent to bringing an action pursuant to NRS 41.031,” the state of Nevada nonetheless
 9 requires notice of claims within two years of their accrual, as part of the statutory scheme it created
 10 when it waived its sovereign immunity from suit. Nev. Rev. Stat. § 41.036(2)–(3); *see also* *Nevada*
 11 *v. Hall*, 440 U.S. 410, 413 n.2 (1979) (quoting Nev. Rev. Stat. § 41.031).

12 The first possible date on which this Court could find that Cepero filed a complaint is
 13 September 2, 2011. This was seven days after the claim-notice deadline of August 26, 2011.
 14 Accordingly, Cepero also failed to comply with the requirements of Nevada Revised Statute
 15 41.036(2) when he brought state claims against LVMPD and 21 LVMPD officers.

16 **C. The Mailbox Rule Does Not Bring Cepero's Suit Within the Statute of Limitations.**

17 Cepero's opposition to the Motion to Dismiss was not timely filed and, therefore, the Court
 18 need not consider it. Even if it were timely brought, the Court finds that it would not change the
 19 disposition of this case. Liberally construed, Cepero's opposition argues that the mailbox rule
 20 affords an avenue for saving his federal claims from the statute of limitations and that this case
 21 should have been combined with an earlier-filed case. *See* Doc. 55 at 2–11. The mailbox rule is
 22 inapplicable to Nevada state claims. *Milton v. Nevada Dep't of Prisons*, 68 P.3d 895, 896 (Nev.
 23 2003) (declining “to create a blanket ‘mailbox’ rule for the filing of complaints for personal injuries”
 24 when prisoners sue Nevada state actors).

25 In *Houston v. Lack*, the Supreme Court held that a prisoner filed his notice of habeas
 26 appeal at the time “he delivered the notice to prison authorities for forwarding to the District Court.”
 27 *Houston v. Lack*, 487 U.S. 266, 270 (1988). The Ninth Circuit applied the *Houston* rule to inmates’
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1 1983 claims in *Douglas v. Noelle* because “prisoners are unable to control their complaints once
 2 they are delivered to prison officials,” because prisoners cannot determine whether courts receive
 3 their mailings, and because prison officials who may be sued “have a particular incentive to delay
 4 the filing of § 1983 suits.” *Douglas*, 567 F.3d at 1107. To benefit from the mailbox rule, prisoners
 5 must demonstrate compliance in one of two ways. In the first approach, a prisoner must place his
 6 complaint in the prison’s locked, legal-mail mailbox by the statute-of-limitations deadline and then
 7 provide either a declaration that complies with 28 U.S.C. § 1746 or a notarized statement.⁴ *Id.* at
 8 1109. Under the second approach, the prison’s own records must show that the prisoner’s complaint
 9 was mailed to the federal district court by registered mail, and the prisoner must further supply a
 10 photocopy of the postmarked envelope he used to mail the complaint. *Id.*

11 Cepero writes that he initially mailed a handwritten complaint to the District of Nevada on
 12 or about August 10, 2011, and it was returned with a template complaint on August 24, 2011;
 13 Cepero allegedly filled it out and remailed it to the federal court on the same day.⁵ Doc. 55 at 2–3.
 14 He maintains that this document was filed in *Cepero v. Hard*, 2:11-cv-01401 on August 30, 2011.
 15 See Doc. 55 at 3. The Court finds a handwritten complaint, based on the same August 2009 arrest,
 16 filed August 31, 2011, in that now-closed case. Doc. 55 at 6; Doc. 1 in 2:11-cv-1401. On August
 17 25, 2011, Cepero mailed an allegedly duplicate complaint for filing in the instant case. Doc. 55 at 5.
 18 The handwritten date on the *Gillespie* complaint is indeed August 24, 2011. Doc. 1 at 15. Cepero
 19 acknowledges it was entered on September 2, 2011. Doc. 55 at 5.

20 In a handwritten letter to the Court dated November 16, 2011, Cepero indicated that he was
 21 confused by his twin *Hard* and *Gillespie* cases. Doc. 55 at 33; Doc. 10-1; Doc. 6-1 in 2:11-cv-1401.
 22 He asked the Court for copies of the complaints, to help him “determine which complaint is which,”
 23 and indicated that he didn’t “know what complaint” was entered in *Hard*. Doc. 55 at 33; Doc. 10-1;

24 ⁴ Under the statute, a declaration executed in the United States must be followed with text in
 25 “substantially” this form: “I declare (or certify, verify, or state) under penalty of perjury that the
 26 foregoing is true and correct. Executed on (date). (Signature).” 28 U.S.C. § 1746.

27 ⁵ In an earlier filing, Cepero placed this date as “[a]bout August 22, 2011.” Doc. 55 at 39; Doc.
 28 11 in 2:11-cv-1401.

1 Doc. 6-1 in 2:11-cv-1401. Further, he suggests that he only meant to instigate one lawsuit when he
 2 wrote that “my complaint is against LVMPD. Here it changes from *Gillespie* to *Hard*.” Doc. 55 at
 3 33; Doc. 10-1; Doc. 6-1 in 2:11-cv-1401. The letter was not ruled upon in either case, but his
 4 December 1, 2011, Motion to Receive Free Copies expressly followed-up on the letter. Doc. 13;
 5 Doc. 7 in 2:11-cv-1401. The motion was granted in *Gillespie* and thus denied as moot in *Hard*.
 6 Doc. 14; Doc. 10 in 2:11-cv-1401.

7 On January 4, 2012, Cepero’s Motion to Amend/Correct Complaint was filed in the *Hard*
 8 docket. Doc 55 at 38–43; Doc. 11 in 2:11-cv-1401. He wrote that “it is obvious NOW that the
 9 paperwork (documents) were filed independently to one another with disregard to my notification
 10 letters.” Doc. 55 at 41 (double underlining in original). He further wrote that “1401 was the
 11 original complaint,” making the *Gillespie* complaint “a sort of duplicate complaint.” Doc. 55 at 42;
 12 Doc. 11 in 2:11-cv-1401. Accordingly, he asked the court to treat the *Gillespie* complaint as an
 13 amendment to the original complaint in *Hard* and to “vacat[e]” *Gillespie*. Doc. 55 at 38; Doc. 11 in
 14 2:11-cv-1401. But the magistrate judge in *Hard* had already entered a report and recommendation
 15 on December 28, 2011, that recommended dismissing the *Hard* complaint because “[t]he claims set
 16 forth therein are duplicative of the claims set forth in” *Gillespie*. Doc. 10 at 1–2. The report and
 17 recommendation expressly found that *Gillespie* “is ongoing and is not affected by this dismissal.”
 18 Doc. 10 at 2. When the district judge adopted this recommendation and dismissed *Hard* on January
 19 20, 2012, her order did not address Cepero’s intervening Motion to Amend/Correct Complaint.
 20 Doc. 12 in 2:11-cv-1401; Doc. 11 in 2:11-cv-1401. When liberally construed, Cepero’s late-filed
 21 opposition is best read as a request to apply the mailbox rule or to retroactively combine his cases.

22 With the right proof, an August 24, 2011, mailing date might place Cepero within the
 23 mailbox exception and thereby permit his suit to proceed. The Court has reviewed his 70-page
 24 opposition to the Motion to Dismiss, with its extensive exhibits, and finds none of the required
 25 proof: there is no statutorily-compliant declaration, notarized statement, prison record, or envelope
 26 photocopy. There is no indication that the third rationale for the *Douglas* rule—namely, that prison
 27 officials may be motivated to delay the filing of complaints—affected this case. The first and
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1 second rationales, however, address prisoners' inability to control the timely filing of complaints
 2 once such documents are mailed. Given Cepero's apparent and repeated efforts to file his complaint
 3 before August 26, 2011, and given the federal courts' policy of liberality toward pro se plaintiffs, the
 4 Court finds that the rationale driving *Douglas* is applicable here. Absent the proof required by law
 5 to trigger that rule, however, the Court cannot apply the mailbox exception to save Cepero's federal
 6 claims and his suit must be dismissed.

7 In addition, Cepero's *Hard* case was opened on August 30, 2011, and that complaint was
 8 filed on August 31, 2011. Doc. 2. Even if the Court retroactively combined the *Hard* and *Gillespie*
 9 cases, and used the *Hard* complaint for statute-of-limitation purposes, it provides him no benefit
 10 because *Hard* blows the statute by four days. Further, assuming *arguendo* that the Court could
 11 apply the mailbox exception to the *Hard* complaint—which was properly before another judge and
 12 is now a closed case—the Court is presented with none of the evidence that would be required under
 13 *Douglas*. The argument for combining Cepero's cases thus fails to salvage his federal claims.

14 **D. The Court Grants in Part and Denies in Part Cepero's Motion for Status Update.**

15 Cepero moves for a copy of the docket sheet or, in the alternative, for a status check. Doc.
 16 59. He writes that he has "no money to pay" and "can only depend on the Court for status check."
 17 Doc. 59 at 2. When Magistrate Judge George Foley Jr. previously granted Cepero's Motion to
 18 Receive Free Copies in this case, he noted that the court would not "be inclined to grant future
 19 requests for free copies of Court documents." Doc. 14 at 1 (granting request for two free copies of
 20 Plaintiff's complaint); *see also* Doc. 13. In light of this order, the Court denies Plaintiff's request for
 21 a free docket sheet, but grants the motion insofar as this Order provides this status update on his
 22 case: Cepero's claims are dismissed because they were filed after the statute of limitations ran,
 23 rendering each of them time-barred as a matter of law.

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II.

Conclusion

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss [Doc. 36] is **GRANTED**; all of Plaintiff's claims are time-barred and therefore **DISMISSED WITH PREJUDICE**.

8 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Copy of Docket Sheet or, in the
9 Alternative, for Status Check of Case Activity **[Doc. 59]** is **GRANTED** in part and **DENIED** in part
10 as set forth herein.

DATED February 21, 2014.

Jennifer A. Dorsey
United States District Judge